No.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

18271

In the Matter of Extradition of

JAIME J. MERINO

A Fugitive from the Justice of

Mexico.

APPELLANT'S OPENING BRIEF

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TOPICAL INDEX

Page

TABLE OF AUTHORITIES CITED

TABLE OF AUTHORITIES CITED (Cont'd)

TABLE OF AUTHORITIES CITED (Cont'd)

U. S. Constitution and Statutes

TABLE OF AUTHORITIES CITED (Cont'd)

Rules

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APPELLANT'S OPENING BRIEF

The appeal in the instant matter is prosecuted to this Court from an order of the United States District Court for the Southern District of California, Central Division, denying your petitioner an application for a writ of mandate, or in the alternative a motion for an order directing the United States Commissioner, Theodore Hocke to make his order authorizing the taking of depositions in the Republic of Mexico for use in evidence in the extradition proceedings against petitioner, or from an order authorizing the Commissioner to exercice his discretion in determining whether or not defendant should be granted an order authorizing the taking of depositions in

Mexico.

STATEMENT OF JURISDICTION

This Court has jurisdiction to entertain this appeal and review the order in question under the provisions of Section 1291 and 1294, Title 28, U.S.C.A.

The jurisdiction of the United States Commissioner to hear the instant extradition matter is predicated on his order of appointment, dated February 28, 1959.

The jurisdiction of the District Court and the United States Commissioner is based upon Section 3184, Title 18, U.S.C.A. and the Extradition Treaty between the United States and Mexico, ratification exchanged April 22, 1899, proclaimed April 24, 1899, as amended.

The application to the District Court for its writ and order was made subsequent to the final order of the United States Commissioner after hearing under Section 3184, U.S.C.A. on April 23, 1962 and filed April 24, 1962.

The notice of appeal to this Court and the designation of record on appeal, was filed with the District Court on April 27, 1962. Timely notice of the appeal vested jurisdiction with this Court.

PRELIMINARY STATEMENT

A prior application was made to the District Court before the hearings contemplated under Section 3184,

U.S.C.A., Title 18. This motion was denied by the District Court, and on appeal to this Court it was determined that the motion was premature, as no "hearing under Section 3184 has as yet been held". (See Merino vs. Hocke, 289 Fed 2d, 636.)

Since finality has not attached to the orders of the United States Commissioner and the District Court on the appellant's petition, the Court has jurisdiction to review the denial of the District Court of appellant's motions.

STATEMENT OF THE CASE

Complaint in extradition was filed February 1, 1960, amended April 12, 1960, charging in essence that the appellant was duly and legally charged with having committed in the Republic of Mexico the crimes of falsification of the official acts of the Government or public authority and the uttering of fraudulent use of the same; embezzlement of public funds by a public officer or depository, while employed by Petroleos Mexicanos, an alleged agency of the Government of Mexico, in the capacity of Superintendent of the District of Posa Rica, the State of Vera Cruz, Mexico, during the years 1957 and 1958.

The amended extradition complaint further charges that the appellant has been found outside the boundaries of Mexico; that a warrant for the arrest of appellant has

cannot be served in Mexico; that the appellant has sought asylum within the jurisdiction of the United States of America and may be found in the State of California, City of Redondo Beach; and that appellant is not a citizen of the United States of America.

On April 25, 1960, appellant moved the United States Commissioner for the Southern District of California, Central Division, for an order authorizing the taking of depositions of witness in the Republic of Mexico. Said motion came on for hearing before the United States Commissioner on May 26, 1960, and was denied.

In the motion before the United States Commissioner, the appellant sought authority to take depositions of certain individuals domiciled in Mexico. The United States Commissioner denied the motion. The appellant then applied to the United States District Court for a writ of mandamus or, in the alternative, an order in the nature of a writ of mandamus directing the United States Commissioner to make the order or exercise his discretion. These motions were denied and affirmed on appeal. (See Merino v. Hocke, 289 Fed 2d, 636)

The extradition proceedings proceeded to finality before the Commissioner. Subsequent to the entry of his order directing extradition, petitioner moved the District Court for his Orders directed to the Commissioner which were denied on April 24, 1962. Hence this appeal.

to establish an alibi. Judge Brown considered the Act of August 3, 1882, and held that while it was the duty of the Commissioner, under Section 3 of that Act, to take such evidence of oral witnesses as should be offered by the accused, the Statute did not apply testimony obtained upon commission or by deposition, adding that, so far as he was aware, there was no warrant, according to the law or the practice before committing magistrates in the State of New York, for receiving testimony by commission or by the depositions of foreign witnesses taken abroad, and that all the provisions of the law and the statutes contemplared the production of the defendant's witnesses in person before the magistrate for examination by him. The order dismissing the writ of habeas corpus in that case was affirmed by the Circuit Court, held by Judge Wallace in re Wadge, 21 Blatchf. 300. He said:

"'The depositions and proofs presented a sufficient case to the Commissioner for the exercise of his judicial discretion, and his judgment cannot be re-reviewed upon this proceeding. He is made the judge of the weight and effect of the evidence, and this Court cannot review his action, when there was sufficient competent evidence before him to authorize him to decide the merits of the case'".

The authority of Cortez supr is limited "Certificates-- copies of papers-- ex parte depositions" are not admiss-

ble in evidence in extradition proceedings.

This is not the instant problem or issue. Petitioner seeks an order to take depositions under statutory authority and procedure. He does not ask use of "ex parte" documents which are under statutory authority limited to the demanding government. Even though foreign governments may not afford persons accused of crime with our concept of due process of law, and such guarantees are not of concern to our Courts, yet, where extradiction proceedings by a foreign power are brought within the doman of the United States, due process and the guarantee of our criminal procedure must protect those who are thus sought to be extradicted under our law. See:

Holmes v. Jennison, 1840, 14 Pet 540, 39 U.S. 540, 568, 10 L. Ed 579

Grin v. Shine, L. Ed. 130

Ex parte LaMantia, D.C.S.D.N.Y. 1913, 206 F 330

Ex parte Fudera, D.C.S.D.N.Y. 1908, 162, F, 591 Appeal dismissed, 219 U.S. 589, 31 S. Ct. 470, 55 L Ed 348

Gallina v Fraser, 278 F 2d 77

Extradiction proceedings have been referred to by the Supreme Court as being of a criminal nature. See:

Grin v Shine 1902, U.S. 181, 23 S Ct. 98, 47 L. Ed. 130

Rice v Ames, 1901, 180 U.S. 371, 21 S Ct. 406, 45 L Ed. 577.

In Grin v. Shine, supra, the Court said:

"Good faith toward foreigh powers, with which we have

entered into treaties of extradition, does not require us to surrender persons charged with crime in violation of those well-settled principles of criminal procedure which from time immemorial have characterized Anglo-Saxon jurisprudence. Persons charged with crime in foreign countries, who have taken refuge here, are entitled to the same defense as others accused of crime within our own jurisdiction.

* * * * * * * *

SPECIFICATIONS OF ERROR

1) THE DISTRICT COURT ERRED IN DENYING APPELLANT'S APPLICATION IN THE NATURE OF A WRIT OF MANDAMUS COMPELLING THE UNITED STATES COMMISSIONER TO PERMIT APPELLANT TO TAKE DEPOSITIONS IN THE REPUBLIC OF MESICO OR, IN THE ALTERNATIVE, TO COMPEL THE UNITED STATES COMMISSIONER TO EXERCISE HIS DISCRETION IN PERMITTING THE TAKING OF DEPOSITIONS.

Section 3184, Title 18, U.S.C., empowers "any justice or judge of the United States, or any Commissioner authorized so to do by a Court of the United States, or any judge of a Court of record of general jurisdiction of any State" in whose jurisdiction the fugitive is found, to conduct (after apprehension and appearance) a hearing "to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence of sufficient to sustain

the charge under the provisions of the proper treaty * * * he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State * * *. Neither statues nor decided cases furnish satisfactory guides as to procedures for obtaining proof upon extradition proceedings. However, the Courts have compared these proceedings with -

> "preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge mad. against him."
>
> Benson v. McMahon, 1888, 127 U.S. 457, 463, 8 S Ct 1240, 1243, 32 L ED 234.

ee First National City Bank of New York vs. Aristeguieta, 287 F 2d 219 (1960)

Rule 5 provides for the proceedings before the United States Commissioner in Criminal Proceedings, which include:

a) Appearance before the Commissioner,

b) Statement by the Commissioner,

c) Preliminary examination.

Rule 15 of the Federal Rules of Criminal Procedure provides for the taking of depositions in criminal cases.

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"preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused, wither by imprisonment or under bail, to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge made against him". Benson v. McMahon, 1888, 127 U.S. 457, 463, 8 S Ct. 1240 1243, 32 L. ED 234. See: First National City Bank of New York v. Aristeguieta, 287 F 2d 219 (1960)

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c) Preliminary examination.

Rule 15 of the Federal Rules of Criminal Procedure provides for the taking of depositions in criminal cases. The deposition of a witness may be taken if he is "unable to attend or prevented from attending a trial or hearing, that his testimony is material, that it is necessary to take his deposition in order to prevent a failure of justice * * * ".

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Sub-division (e) of Rule 15 provides in part, as follow:

(e) "At the trial or upon any hearing, a part of all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears: That the witness is dead; or that the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or that the witness is unable to attend or testify because of sickness or infirmity; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena * * *". Clearly a witness outside of the United States could not be subpoened, but his testimony would, of necessity, have to be secured by deposition.

It appears to be well settled that the District Court have supervisory powers over the United States Commissioners appointed to assist said Courts in their judicial functions.

"The Commissioner (in an extradition proceeding) is in fact an adjunct of the Court, possessing independent

though subordinate judicial powers of his own".

Grin v. Shine, 187 U.S. 181, 187 (1902) emphasis supplied.

"The United States Commissioner, being only a ministerial or quasi judicial officer, is always under the supervision and direction of the District Court. His findings may be reviewed by the District Court at any time".

U.S. v. Zerbst, 111 F Sup. 807, 810 (E.D.S.C. 1953)

See U.S. vs. Florida, 165 F. Sup. 328 E.D. Ark. 1958

Since the District Court has general supervisory responsibility over a United States Commissioner, it would seem clear that as part of the District Court's jurisdiction that it has the corollary power to function in this supervisory capacity, whether this power be designated as a power to issue a writ of mandamus or the power to grant appropriate orders.

"The abolition of the writ of mandamus under the provisions of Rule 81 (b) of the Civil Rules for District Courts, 28 USCA following Section 723c, does not qualify or limit the existing statutory jurisdiction since relief heretofore available by mandamus may nevertheless be obtained by other appropriate practice prescribed in the Rules".

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"The qualifications to the jurisdiction this con-

ferred limits the jurisdiction of District Courts to the issuance of such writs which may be necessary to the exercise of their respective jurisdictions and agreeable to the usages and principles of law. Under this Section, District Courts may issue writs of mandamus when necessary to the exercise of their jurisdiction but not as original writs in any case".

Patrowski v Nutt, 161 F 2d 938, 939 (9th Cir. 1947) cert. denied 333 U.S. 842, rehearing denied 332 U.S. 882.

"The United States Commissioner is a ministerial-or at best, only a quasi judicial-officer and his acts therefore are subject to review by the District Court.

U.S. v. Zerbst, supr. p. 809

Based on the foregoing authorities, petitioner respectfully submits that it is patently obvious the District Court had inherent power to supervise the granting or denial of his motion before the Commissioner to take depositions in the Republic of Mexico and that any attempt to resolve the issue to one of semantics is simply an attempt to avoid the issue of whether or not appellant was in fact entitled to take such depositions.

PETITIONER'S SHOWING OF NECESSITY FOR AUTHORITY TO TAKE DEPOSITIONS MADE BEFORE THE UNITED STATES COMMISSIONER AND THIS COURT WAS UNREBUTTED AND THEREFORE CANNOT BE CHALLENGED AT THIS TIME.

Attention is respectfully invited to the transcript of record containing the affidavit of BARTON C. SHEELA, Jr. in support of the request to take depositions in

the Republic of Mexico. This affidavit was presented both to the United States Commissioner and to the District Court. It is significant that at no time were the allegations in this affidavit rebutted. An examination of the matters contained therein establishes beyond peradverture that petitioner has demonstrated the necessity of judicial authorization to take the depositions requested. If the parties opposing petitioner's request to take depositions wished to challenge the accuracy of Mr. Sheela's affidavit, the appropriate time to do so would have been either when the matter was being considered by the United States Commissioner or the District Court. Petitioner submits that based on the record filed with this Honorable Court the necessity of taking the requested depositions has been amply demonstrated.

The argument of respondent that taking of depositions would delay the extradition hearing and that certain language difficulties would be involved which would appear to be no more than an attempt to justify the fuling of the Commissioner on a ground on which it was not in fact predicated. As noted, the sole basis upon which the Commissioner denied the request to take depositions was that he was bound by the decision of the Supreme Court in Luis Oteiza y Cortez vs Jacobus, supr. Should it be determined that the Commissioner

in fact had the power to authorize these depositions, then we can be certain that the delays and difficulties mentioned by respondent will be controlled by the Commissioner.

THE CONTENTION THAT THE EVIDENCE SOUGHT TO BE ADDUCED THROUGH DEPOSITIONS REFERS ONLY TO MATTERS OF DEFENSE, IGNORES THE FACT THAT AN EXTRADITION PROCEEDING IS NOT EX PARTE AND THE RESISTING PARTY HAS THE RIGHT TO PRESENT EVIDENCE.

Respondent apparently conceives of an extradition proceeding as being unilateral in that the resisting party may not offer evidence to rebut the showing of probable cause. Attention is respectfully invited to Section 3191, Title 18, U.S. Code, which specifically provides that an indigent party in an extradition proceeding may obtain the presence of "witnesses whose evidence is material to the defense" at government expense. It would appear clear therefore that any argument that evidence to support a finding of probable cause must go unrebutted must be rejected. Petitioner submits that the matters set forth in the affidavit of BARTON C. SHEELA, Jr. clearly demonstrate their materiality to the issue of whether or not there is sufficient evidence which would justify the apprehension and committment for trial of petitioner.

Petitioner specifically directs the court's attention to petitioner's request that he be permitted to take depositions which would show that much of the

evidence produced by the demanding government was the product of threats, promises and coersion. It would seem patently obvious that this evidence would be of real interest to the Commissioner in determining what weight, if any, should be given to the purported testimony contained in the demanding government's papers filed with the Commissioner.

See U.S. v. Artukovich, 170 F Sup. 383, 390 (S.D. Cal. 1959)

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2) THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION FOR AN ORDER DIRECTING THE UNITED STATES COMMISSIONER TO MAKE AN ORDER AUTHORIZING THE TAKING OF DEPOSITIONS IN THE REPUBLIC OF MEXICO OR, IN THE ALTERNATIVE, TO ORDER THE UNITED STATES COMMISSIONER TO EXERCISE HIS DISCRETION IN DETERMINING WHETHER OR NOT APPELLANT SHOULD BE PERMITTED TO TAKE DEPOSITIONS IN THE REPUBLIC OF MEXICO.

We respectfully content that an international extradiction proceedins, the magistrate and Court have the right and power to authorize the taking of depositions on behalf of the accused. There is, indeed, a strong showing by affidavid of exceptional facts and circumstances which, in the interest of fairness and to "prevent failure of justice", and in the exercise of due process, requres the taking of the deposition. The evidence sought is for the purpose of explaining the charge against the accused and not strictly speaking

a defense to the merits.

The accused may offer "limited evidence admissible under recognized standards to explain elements in the case against him". First National City Bank of New York vs Aristeguieta, 287 F 2d 219 (1960)

> "* * * moreover, Section 3191 provides, as to an indigent fugitive, where "there are witnesses whose evidence is material to his defense" and without whom "he cannot safely go to trial," the magistrate "may order that such witnesses be subpenaed" and the costs incurred and the fees of the witnesses "shall be paid in the same manner as in the case of witnesses subpenaed in behalf of the United States."

A witness may be subpenaed to give testimony by deposition hearing on behalf of the accused. A liberal interpretation of Section 3191 of Title 18, Supra permits and sanctions the obtaining of the testimony either by depositions or personal appearance through the power of the Court or the magistrate to issue its subpoena for such purpose. The appellant herein has promptly and dilligently sought to secure the depositions in this case and has not been dilatory in any particular.

He originally initiated the motion before the hearing magistrate at the inception of the proceedings

before him, which was denied; then sought an order of the District Court to compel the taking of depositions. This being denied, he sought the authority of this Court, which held the application was premature.

Merino v Hocke, 289 F 2d 636

At the conclusion of proceedings before the United States Commissioner, an order was again sought from the District Court. His application to compel the Commissioner to exercise his authority authorizing the taking of deposition or a direct order for the taking of the depositions by the United States District Court was denied by the Court and hence this appeal.

These are not belated efforts of the accused, but prompt and continuous requests which have been denied.

In Benson vs. McMahon, 127 U.S. 457, the Supreme Court in interpreting the identical treaty with Mexico and the nature of the proceedings before the Magistrate declared:

> "Taking this provision of the treaty and that of the Revised Statues above recited 460, we are of opinion that the proceeding before the Commissioner is not to be regarded as in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him, but rather of the character of those preliminary examinations which take place every day in this country

before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment or other proceeding, in which he shall be finally tried upon the charge made against. The language of the treaty which we have cited, above quoted, explicitly provides that the 'commision of the crime shall be so established as that the laws of the country in which the fugitive or the person so accused shall be found would justify his or her apprehension and committment for trial if the crime had been there committed.' This prescrives the proceedings in these preliminary examinations as accurately as language can well do it."

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3) THE DISTRICT COURT ERRED IN FAILING TO MAKE ITS ORDER TO TAKE THE DEPOSITIONS UNDER THE APPROPRIATE DEPOSITIONS STATUTE OF THE UNITED STATES.

In this matter it is essential that Mr. Merino obtain relevant evidence in Mexico that will establish clearly that there is no reasonable or probably cause to justify his extradition to Mexico.

Certainly the United States Constitution which provides in part "no person can be deprived of life,

liberty or property without due process of law" is ample authority. Recent developments and trends in the field of criminal law in thestate and federal courts indicate that when the interests of justice require, the accused will be permitted rights that have heretofore been denied.

1. Federal cases reflecting a liberal trend are as follows: Mapp vs. Ohio 367 U.S. 643 Jenks v. United States. 353 U.S. 657, which accorded the defendant discovery rights (production of statements) to afford an opportunity to impeach the credibility of government witnesses on cross examination. Refusal to produce on the part of the government requires a dismissal.

Elkins v. United States, 364 U.S. 206, held that evidence obtained by state officers during a search which if conducted by federal officers would have violated the defendant's immunity from unreasonable search and seizure under the Fourth Amendment, is inadmissible over the defendant't timely objection in a federal criminal trial. This decision appears to have overruled Weeks v. United States, 232 U.S. 384 (1914), which held that evidence illegally seized by federal officials in violation of the Fourth Amendment was inadmissible in a federal prosecution. The Court states that no such ex-

clusion should apply in a federal case where the unlawful seizure was by local officials since the Fourth Amendment was not enforceable against the States.

Jones v. United States, 363 U.S. 257 (1960), wherein the defendant, a guest in an apartment who was not required to claim ownership of the drugs in moving to suppress evidence. The Court stated that anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress when its fruits are proposed to be used against him.

2. California cases reflecting this trend are the following:

People v. Riser, 37 Cal. 2d 566, 586, 305 P 2d L (1956), holding that it was error to refuse to compel the production of the statements of prosecuting witnesses and noting that the statements in order to be accessible to the defense need not be signed. The court in its opinion stated:

> "*** Absent some governmental requirement that information be kept confidential for the purpose of effective law enforcement, the state has no interest in denying the accused access to all evidence that can throw light on issues in the case, and in particular it has no interest

in convicting on the testimony of witnesses who have not been as rigorously cross-examined and as thoroughly impeached as the evidence permits. To deny flatly any right of production on the ground that an imbalance would be created between the advantages of prosecution and defense would be to lose signt of the true purpose of a criminal trial, the ascertainment of the fact. ***"

Powell v. Superior Court, 48 C 2d 704, 709, 331P 2 d 698 (1957), stated:

"*** ' *** That it was desired that the state's evidence remain undisclosed, partakes of the nature of a game, rather than judicial procedure. The state in its might and power ought to be and is too jealous of according a defendant a fair and impartial trial to hinder him in intelligently preparing his defense and in availing himself of all competent material and relevant evidence that tends to throw light on the subject-matter on trial.'"

Norton v. Superior Court, 173 C.A. 2d 133, 343P. 2 d 139, granted mandamus to compel the prosecution to display to counsel for the defense photographs of defendant displayed to three robbery victims, and further ordered that defendant be supplied with

the names and addresses of witnesses to the offense with which defendant was charged.

Funk v. Superior Court, 52 C. 2d 423, 340 P 2 d 593 (1959), held that defendant was entitled prior to the trial to recorded statements and to written statements prepared by investigators concerning conversations with prosecution witnesses.

Schindler v. Superior Court, 161 C.A. 2d 513, 327 P 2d 68 (1958), in addition to compelling the inspection of statements made by defendant, held that counsel for the defense was entitled to examine tissue specimens taken by an autopsy surgeon where examination of such was material to the cause of death of the victim.

See also Walker v. Superior Court, 155 C.A. 2d 134, 317 P. 2d 130 (3rd. Dist., 1957).

People vs. Chapman, 52 C 2d 95, 338 P. 2d 428 (1959), held it error to refuse to produce written statements prepared by the police and signed by the principal prosecution witness.

3. The appellant submits on the basis of the following that the court below erred:

Title 18, United States Code, Sectin 1651a, states:

> "The Supreme Court and all courts established by act of Congress may issue all writs necessary in aid of their respective jurisdictions and

agreeable to the usages and principles of law."

See also Hammond v. Hull, 131 F ed 23, 25 (C.A. D.C. , 1942) (Cert. denied 318 U.S. 777), which noted in an action for declaration of plaintiff's rights as a foreign servoce pffocer. that the remedy formally known as mandamus was still available under the new Rules of Civil Procedure.

Grier v. Kennen, 64 2d 605 (8th Cir., 1933), held that an application to the United States District Court for a writ of mandamus compelling the United States Commissioner to entertain a hearing under former Section 641 of Title 18, U.S.C. (now Title 18, U.S.C., Section 3569), as to the ability of the petitioner to pay a fine was the proper remedy to compel the Commissioner to conduct such a hearing.

United States v. Dockery, 50 F Supp. 410 (E.D.N.Y. 1943), held that the United States District Court has inherent power to permit the taking of depositions outside of the United States in order to prevent an injustice (but holding that there was an insufficient showing under the facts there presented).

United States vs. U. S. District Court, 238 F 2d 813 (4th Cir., 1956) (cert. denied 352 U.S. 981),

held that the Circuit Court had power under the "all writs section" (28 U.S.C., Section 1651a) to issue a writ of mandamus to compel the District Court Judge to vacate an order quashing certain subpoenas duces tecum for production of documents before a Federal Grand Jury and also to vacate certain other orders of the Judge.

Paramount Pictures v. Rodney, 186 F 2d 111 (3rd Cir., 1951) (Cert. denied 340 U.S. 953) held that mandamus was the proper remedy to compel a District Court Judge to exercise his discretion in passing on a motion to transfer certain suits under Title 28, U.S.C., Section 1404a, for the convenience of parties and witnesses where the District Court had ruled it had no power to transfer the cause.

Rule 12, Federal Rules of Criminal Procedure, states:

> "If it appears that a prospective witness may be unable to attend or is prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition in order to prevent failure of justice the court at any time after the filing of an indictment or information may upon motion of a defendant and notice to the parties, order that his testimony be taken by deposition and that any designated books, papers, documents or

tangible objects, not privileged, be produced at the same time and place. ***"

See Luxemberg v. United States, 45 F 2d 497 (4th Cir. 1930) (cert. denied 283 U.S. 820)

Compare Wong Yim v. United States, 118 F 2d 667 (9th Cir., 1941 (cert. denied 313 U.S. 589).

Title 18, United States Code, Section 3191, states:

"On the hearing of any case under a claim of extradition by a foreign government, upon affidavit being filed by the person charged setting forth that there are witnesses whose evidence is material to the defense, that he cannot safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the judge or commissioner hearing the matter may order that such witnesses be subpoenaed, and the costs incurred by the process and the fees of the witnesses, shall be paid in the same manner as in the case of witnesses subpoenaed in behalf of the United States."

Title 28, United States Code, Section 1781, states:

"Whenever a court of the United States issues letters rogatory or a commission to take a

deposition in a foreign country, the foreign court or officer executing the same may make return thereof to the nearest United States minister or consul, who shall endorse thereon the place and date of his receipt and any change in the condition of the deposition, and transmit it to the clerk of the issuing court in the manner in which his official dispatches are transmitted to the United States Government."

Rule 26, Federal Rules of Civil Procedure, states:

"The deposition of a person confined in prison may be taken only be leave of court on such terms as the court prescribes."

See also, United States v. Artukovich, 170. Supp. 383, 393 (S.D. Cal. 1959)

The following authorities concern documents obtained ex parte by a party resisting extradition:

Luis Oteiza y Cortez v. Jacobus, 136 U.S. 330 1890); United States v. Artukovich, supra.

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4) THAT THE DISTRICT COURT ERRED IN DETERMINING THAT IN RE LUIS OTEIZA y CORTEZ (1890) 136 U.S. 330, DENIED THE RIGHT OF APPELLANT TO TAKE DEPOSITIONS IN SUPPORT OF HIS DEFENSE.

Both the Commissioner and the District Court predicated their denial of petitioner's right to take de-

positions by approved statutory procedure on the authority of Cortez v. Jacobus, 136 U.S. 330. It is our contention that this decision is not authority for the proposition propounded.

By dictum, it may be, but dictum does not establish law. The petitioner in that case sought to introduce ex parte statements and depositions and the ruling expounded held that such documents were not admissible. This is a far cry from petitioner's position in these proceedings.

We propose to take depositions in the Republic of Mexico under statutory authority which accords the demanding Government the right to be heard on application with respect to relevancy and materiality. If it should be determined by the lower Court that some of the testimony of the witnesses sought to be elicited, is not relevant to the issue of probable cause, the Court may so rule. Regardless, a denial as matter of law that all evidence by deposition are not available to the fugitive, is contrary to our concept of due process to which the accused is entitled.

An examination of the record as designated and filed with this Honorable Court establishes beyond peradventure that when the United States Commissioner and the District Court denied appellant's motion

to take depositions in the Republic of Mexico, the Commissioner predicated his denial on the ground that he was bound by the decision of the Supreme Court in Luis Oteiza y Cortez v. Jacobus, 136 U.S. 330 (1890). Attention is invited to page 7 of the Transcript of Record setting forth the affidavit of Peter J. Hughes presented before the United States District Court in support of the matters from which appeal has been taken, which affidavit stated in pertinent part:

> "The Honorable Theodore Hocke denied said motion for an order authorizing the taking of depositions and that the sole ground upon which said denial was predicated by Commissioner Hocke was that he was bound by the decision of the United States Supreme Court in Luis Oteiza y Cortez v. Jacobus, 136 U.S. 330 (1890)"

The District Court's opinion held likewise. This affidavit was not rebutted by appellee.

Appellant submits that based on the record as lodged with this Honorable Court, it is patently obvious that the United States Commissioner failed to either grant appellant's motion to take depositions in the Republic of Mexico or to exercise his discretion as to whether or not appellant shoule be allowed to take such depositions on the ground that

the Commissioner was precluded from granting such a request. It is submitted that the instant appeal therefore is controlled by the case of Paramount Pictures v. Rodney, 186 F 2d 111 (3rd Cir., 1951) where the lower court erroneously held that it lacked power to grant certain relief. Mandamus was held to be a proper remedy in that situation.

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5) THAT THE DISTRICT COURT ERRED IN DETERMINING THAT DEPOSITIONS WERE UNAVAILABLE TO THE DEFENSE IN EXTRADITION PROCEEDINGS AND DENIED THE RIGHT TO APPELLANT TO TAKE DEPOSITIONS BY THE WAY OF A SUBPENA IN A FOREIGN COUNTRY, UNDER TITLE 18, U.S.C. , SECTION 3191.

See Points and Authorities under 1, 2, 3, 4, Supra.

****

6) THAT THE DISTRICT COURT ERRED IN DETERMINING THAT EITHER UNDER RULE 15 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE OR RULE 26, FEDERAL RULES OF CIVIL PROCEDURE, WERE NOT APPLICABLE TO EXTRADITION PROCEEDINGS.

See Points and Authorities under 1, 2, 3, 4, Supra.

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7) APPELLANT WAS DENIED DUE PROCESS OF LAW.

The Courts of California and of the United States have uniformily held that preliminary examinations

must accord persons accused of crime with due process of law and established vested rights and procedure.

> "The forms of procedure required by law in preliminary examinations establish a substantial right vested in every person charged with crime and should not be lightly waved aside. People v. Weatherford, 27 Cal. 2d 401 (164 P 2d 753).
>
> A legal preliminary examination is one of the steps required to establish due process of law where the prosecution in the Superior Court is by information and is necessary to confer jurisdiction on that Court."
>
> People v. Brooks, 72 C.A. 2d, 657; 165 P 2d 51
>
> In re Williams, 52 Cal. Ap. 566
>
> People v. Elliot, 54 C 2 498

In this matter, it is essential that Mr. Merino obtain relevant evidence in Mexico, to explain the charge against him, in order that he may establish a lack of reasonable or probably cause to justify his extradiction to Mexico. To deny the accused the right to produce evidence within limited confines accorded a fugitive in extradiction proceedings by way of deposition is, in effect, a denial of due process of law and would sanction "a failure

of justice". The United States Constitution, which provides that: "No person can be deprived of life, liberty, or property without due process of law ...." is a fundamental requirement in extradiction.

Enlightened concept in the interpretation of "due process", both in State and Federal criminal procedure, indicate that, where justice requires, the accused shall now enjoy the rights which had previously been denied him.

In Collins v. Loisel, 259 U.S. 309, 42 Sup. Ct. 469 (1921), the Supreme Court held that testimony or evidence in the form of explanations of ambiguity or doubtful elements in the prima facie case against the accused bearing on the issue of probable cause was proper and appropriate. In Charlton v Kelly, 229 U.S. 477, 33 Sup. Ct. 945 (1912), the Court held that the exclusion by the extradition magistrate of evidence dealing with affirmative defenses constitutes mere harmless error but, in so holding, the Court enunciated that 18 U.S.C. §3191, relating to defense depositions, applied materially in so far as it related to evidence bearing upon the issue of probable cause. Section 3191 provides:

"On the hearing of any case under a claim of

extradition by a foreign government, upon affidavit being filed by the person charged setting forth that there are witnesses whose evidence is material to his defense, that he cannot safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the judge or commissioner hearing the matter may order that such witnesses be subpoenaed and the costs incurred by the process, and the fees of witnesses, shall be paid in the same manner as in the case of witnesses subpenaed in behalf of the United States. June 25, 1948, c 645, 62 Stat. 825." (Emphasis supplied.)

The Supreme Court in Charlton v. Kelly, Supra, stated at page 949:

"To have witnesses produced to contradict the testimony for the prosecution is obviously a very different thing from hearing witnesses for the purpose of explaining matters to by the witnesses for the government.

It is the position of appellant that when the Commissioner and District Judge did not permit the taking of the depositions, the appellant could not as a result of the denial "safely go to trial" in the committment proceedings. This was not a mere harmless error in the proceedings but denial of due process and palpable error, requiring a remand of the proceedings for the purpose of allowing the depositions.

Respectfully submitted,

DAVID C. MARCUS

CERTIFICATE OF COUNSEL

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I, DAVID C. MARCUS, one of the attorneys for the above named appellant, JAIME J. MERINO, do certify that I have examined the provisions of Rule 18 and 19 of the above entitled Court, and that in my opinion the tendered brief on behalf of the petitioner conforms to all requirements.

DATED: April 1, 1963.

David C. Marcus

DAVID C. MARCUS

STATE OF CALIFORNIA)
) ss
County of Los Angeles)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 215 West Fifth Street, Los Angeles 13, California, that on April , 1963, I served the within APPELLANT'S OPENING BRIEF - In the Matter of Extradition of Jaime J. Merino, a Fugitive from the Justice of Mexico - on the following named party by depositing the designated copies thereof, inclosed in a sealed envelope with postage thereon fully prepaid in the United States Post Office in the City of Los Angeles, California, addressed to said party at the address as follows:

United States Attorney
Southern District of California
Sixth Floor Federal Building
Los Angeles, California

3 copies

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April , 1963, at Los Angeles, California.

D. A. Marshall
Signature